PT Bank Maybank Syariah Indonesia v Mindo-Trade Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22A1504–12 OF 2012
ASMABI MOHAMAD JC
12 NOVEMBER 2013

Banking — Banks and banking business — Loan agreement — Default in repayment — Whether failure to produce financing facility documentation fatal — Whether rights and obligations of parties could be determined from other documents — Whether lender obligated to first exhaust its rights against borrower before commencing action against guarantors — Whether certificate of indebtedness conclusive evidence of indebtedness — Burden to disprove amount stated in certificate of indebtedness — Whether detailed statement of account required

Civil Procedure — Summary judgment — Application for — Banking — Default of payment — Whether requirements for summary judgment satisfied — Whether matter suitable to be decided summarily — Whether inordinate delay in applying for summary judgment — Whether defendant having real or bona fide defence — Critical examination of affidavits and documentary exhibits — Whether triable issues established

Civil Procedure — Summary judgment — Delay — Whether inordinate delay in applying for summary judgment — Whether satisfactorily explanation for delay given

At the request of the first defendant/first respondent, the plaintiff/applicant granted PT Mindo Tech ('the borrower') financing facilities ('financing facility'). The defendants/respondents were the guarantors to the financing facility vide execution of the following documents: corporate guarantee executed by the first defendant; and letter of guarantee executed by the second and third defendants respectively. Clause 11 of the terms and conditions of the corporate guarantee and the letter of guarantee respectively provided that a statement signed by a manager, secretary or any officer of the plaintiff as to the monies and liabilities due and incurred to the plaintiff from the borrower shall be binding, final and conclusive evidence against the defendants for all purposes ('cl 11'). The borrower defaulted in payment and the plaintiff commenced the present action demanding from the defendants as guarantors, payment of the outstanding amounts. The plaintiff then filed the present

application for summary judgment of its claim ('the application'). The defendants contended, inter alia, that: (i) there was undue delay in filing the application; (ii) the plaintiff had failed to exhibit the financing facility documents; (iii) the plaintiff failed to resort to legal action against the borrower or other security parties; and (iv) the plaintiff had failed to exhibit the satement of account. The plaintiff claimed that the application was filed on 20 May 2013 after the disposal of the defendants' application to set aside the judgment in default ('JID') entered against the first defendant. The application to set aside the JID was disposed of only on 22 April 2013. Hence, the plaintiff claimed that there was no inordinate delay on the part of the plaintiff in filing the application.

Held, allowing the application with costs of RM4,000:

(1) Once the plaintiff has satisfied the three requirements: (i) that the defendant has entered appearance; (ii) that the statement of claim has been served on the defendant; and (iii) that the affidavit in support of the application complies with the requirements of O 14 r 2 of the Rules of Court 2012 ('the ROC') in that the application must be supported by an affidavit stating the deponent's belief that there is no defence to the plaintiff's claim, the plaintiff would have established a prima facie case and would be entitled to judgment. The burden then shifts to the defendant to show the merits in the defence (see paras 14–15).

(2) Where all the issues are clear and the matter in substance can be decided once and for all without having to go through a full blown trial, the matter ought to be resolved and decided in an O 14 application. The court should only exercise the power under the said order in very clear cases (see para 16).

(3) When deciding an application under O 14 of the ROC, the court must look at the whole situation and be satisfied that the defendant has no fair or reasonable probability in having a real or bona fide defence. The court has a duty to peruse and examine all affidavits and documentary exhibits critically before making a decision (see para 21).

(4) There was no inordinate delay in the filing of the application. The plaintiff had satisfactorily explained the reason for the delay, if any. The court has the discretion to examine the chronology of events surrounding each case in order to ascertain if the plaintiff was guilty of laches (see para 24).

(5) The rights and obligations of the defendants were clearly defined in the corporate guarantee and the letter of guarantee respectively. Hence, the failure of the plaintiff to exhibit the financing facility documentation was not fatal. The rights and obligations of the defendants could be determined from the four corners of these documents (see para 25).

(6) Pursuant to cl 7A of the corporate guarantee and cl 7A of the letter of guarantee, the plaintiff was not obligated to first exhaust its rights against the borrower or against other security parties before commencing its action against the defendants. These clauses provided that the plaintiff had the right to pursue all remedies available against the defendants simultaneously, contemporaneously or consecutively to recover the monies the plaintiff had granted to the borrower (see para 29).

(7) The plaintiff had exhibited the 'Certificate of Indebtedness' issued by the plaintiff pursuant to cl 11. Pursuant to cl 11, a 'Certificate of Indebtedness' issued by the plaintiff was conclusive evidence of the Borrower's indebtedness to the plaintiff. The burden then shifted to the defendants to disprove the amount claimed as stated in the 'Certificate of Indebtedness'. The law does not require the plaintiff to provide a detailed statement of account. The defendant had not discharged the burden to prove that the certificate of indebtedness was tainted with manifest errors. Therefore there was conclusive evidence that the amount due and owing were as shown in the said certificate (see para 30).

(8) The plaintiff had demonstrated that its application was correctly and properly filed and the defendants had not discharged the burden to establish triable issues requiring a trial of the plaintiff's claim (see para 32).

[Bahasa Malaysia summary

Atas permintaan defendan pertama/responden pertama, plaintif/pemohon telah diberikan PT Mindo Tech ('peminjam') kemudahan kewangan ('kemudahan kewangan'). Defendan-defendan/responden-responden adalah penjamin-penjamin kepada kemudahan kewangan itu melalui pelaksanaan dokumen-dokumen berikut: jaminan korporat yang dilaksanakan oleh defendan pertama; dan surat jaminan yang dilaksanakan oleh defendan-defendan kedua dan ketiga masing-masingnya. Fasal 11 terma dan syarat kepada jaminan korporat dan surat jaminan masing-masing memperuntukkan bahawa satu kenyataan yang ditandatangani oleh pengurus, setiausaha atau mana-mana pegawai plaintif berkaitan wang dan liabiliti yang perlu dibayar dan terakru kepada plaintif daripada peminjam hendaklah menjadi keterangan yang mengikat, muktamad dan konklusif terhadap defendan-defendan bagi semua tujuan ('fasal 11'). Peminjam telah gagal dalam bayaran dan plaintif telah memulakan tindakan ini dengan menuntut daripada defendan-defendan sebagai penjamin-penjamin, bayaran baki jumlah. Plaintif kemudian telah memfailkan permohonan ini untuk penghakiman terus bagi tuntutannya ('permohonan itu'). Defendan-defendan berhujah, antara lain, bahawa: (i) terdapat kelewatan yang tidak wajar dalam memfailkan permohonan itu; (ii) plaintif telah gagal mengekshibitkan dokumen-dokumen kemudahan kewangan; (iii) plaintif gagal mengambil tindakan undang-undang terhadap peminjam atau pihak-pihak jaminan lain; dan (iv)

plaintif telah gagal mengekshibitkan penyata akaun. Plaintif mendakwa bahawa permohonan itu telah difailkan pada 20 Mei 2013 selepas selesai permohonan defendan untuk mengetepikan penghakiman terus ('PT') yang dimasuki terhadap defendan pertama. Permohonan untuk mengetepikan PT itu hanya selesai pada 22 April 2013. Justeru, plaintif mendakwa bahawa tidak ada kelewatan melampau di pihak plaintif memfailkan permohonan itu.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM4,000:

(1) Setelah plaintif memenuhi tiga keperluan: (i) bahawa defendan telah memasuki kehadiran; (ii) bahawa penyataan tuntutan telah disampaikan ke atas defendan; dan (iii) bahawa afidavit sokongan permohonan itu mematuhi keperluan A 14 k 2 Kaedah-Kaedah Mahkamah 2012 (' KKM') di mana permohonan itu hendaklah disokong dengan afidavit yang menyatakan deponen mempercayai bahawa tiada pembelaan terhadap tuntutan plaintif, plaintif akan dapat membuktikan kes prima facie dan akan berhak terhadap penghakiman itu. Beban itu kemudian akan berpindah kepada defendan untuk menunjukkan merit dalam pembelaan itu (lihat perenggan 11–15).

(2) Di mana semua isu adalah jelas dan perkara penting boleh diputuskan sekaligus tanpa perlu perbicaraan penuh, perkara itu patut diselesaikan dan diputuskan dalam permohonan A 14. Mahkamah patut hanya menggunakan kuasa di bawah Aturan tersebut dalam kes-kes yang nyata sahaja (lihat perenggan 16)

(3) Apabila memutuskan permohonan di bawah A 14 KKM, mahkamah perlu melihat keadaan keseluruhan dan berpuas hati bahawa defendan tiada kebarangkalian yang adil atau munasabah dalam pembelaan sebenar atau bona fide. Mahkamah mempunyai kewajipan untuk meneliti dan memeriksa semua afidavit dan ekshibit dokumentar secara terperinci sebelum membuat keputusan (lihat perenggan 21).

(4) Tiada kelewatan melampau dalam memfailkan permohonan itu. Plaintif telah menjelaskan dengan secukupnya sebab kelewatan itu, jika ada. Mahkamah mempunyai budi bicara untuk memeriksa kronologi kejadian yang berkisar setiap kes bagi tujuan memastikan jika plaintif bersalah kerana laches (lihat perenggan 24).

(5) Hak dan tanggungjawab defendan-defendan ditakrifkan dengan jelas dalam jaminan korporat dan surat jaminan masing-masing. Justeru, kegagalan plaintif untuk mengekshibitkan pendokumenan kemudahan kewangan tidak memudaratkan. Hak dan tanggungjawab defendan-defendan boleh ditentukan berdasarkan dokumen-dokumen tersebut (lihat perenggan 25).

(6) Menurut fasal 7A jaminan korporat dan fasal 7A surat jaminan, plaintif tidak diwajibkan untuk menggunakan hak terdahulu terhadap

peminjam atau terhadap pihak-pihak jaminan lain sebelum memulakan tindakannya terhadap defendan-defendan. Fasal-fasal tersebut memperuntukkan bahawa plaintif mempunyai hak untuk meneruskan semua remedi yang ada terhadap defendan-defendan pada masa yang sama, semasa atau berturut-turut untuk mendapat balik wang yang telah diberikan plaintif kepada peminjam (lihat perenggan 29).

(7) Plaintif telah mengekshibitkan 'Certificate of Indebtedness' yang dikeluarkan oleh plaintif menurut fasal 11. Menurut fasal 11, suatu 'Certificate of Indebtedness' yang dikeluarkan oleh plaintif adalah keterangan konklusif keberhutangan peminjam terhadap plaintif. Beban itu kemudian berpindah kepada defendan-defendan untuk menyangkal jumlah yang dituntut sebagaimana dinyatakan dalam 'Certificate of Indebtedness' itu. Undang-undang tidak memerlukan plaintif mengemukakan penyata akaun yang terperinci. Defendan tidak melepaskan beban untuk membuktikan bahawa sijil keberhutangan itu telah dicemari dengan kesilapan yang banyak. Oleh itu terdapat keterangan konklusif bahawa jumlah yang perlu dibayar dan terhutang adalah seperti mana dinyatakan dalam sijil tersebut (lihat perenggan 30).

(8) Plaintif telah menunjukkan bahawa permohonannya telah difailkan dengan betul dan teratur dan defendan-defendan tidak melepaskan beban untuk membuktikan isu-isu yang perlu dibicarakan yang memerlukan perbicaraan untuk tuntutan plaintif (lihat perenggan 32).]

Notes

For cases on application for summary judgment, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8879–8950.

For cases on delay, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 9050–9100.

For cases on loan agreement, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2617–2617.

Cases referred to

Bank Bumiputra Malaysia Bhd v Esah binti Abdul Gani [1986] 1 MLJ 16, SC (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, SC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Chan Boi Loi v Public Bank Bhd and another application [2011] 1 MLJ 478 ; [2009] 6 CLJ 81, FC (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282; [1980] 1 LNS 168, FC (refd)

Comptroller-General of Inland Revenue Malaysia v Weng Lok Mining Co Ltd [1969] 2 MLJ 98 (refd)

Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332; [1987] CLJ (Rep) 120, SC (refd)
Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312; [1994] 1 CLJ 328, SC (refd)
MBF Finance Bhd v Hasmat Properties Sdn Bhd & Ors [1990] 1 MLJ 180, HC (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183; [1987] CLJ (Rep) 182, SC (refd)
National Company For Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283, FC (refd)
Polygram Records Sdn Bhd v Hillary Ang & Ors & Anor [1994] 3 MLJ 127; [1994] 3 CLJ 806, HC (refd)

Legislation referred to

Bankers' Book (Evidence) Act 1949 ss 4, 5
Evidence Act 1950 ss 34, 91
Rules of Court 2012 O 14, O 14 r 2
Rules of the High Court 1980 O 14

JS Hoi (Lee Hishamuddin Allen & Gledhill) for the applicant.
Anita Vijaya Rajah (Ramesh Vasan & Co) for the respondent.

Asmabi Mohamad JC:

INTRODUCTION

[1] This was a claim by the plaintiff against the first, second and third defendants for the recovery of the sum of USD2,138,146.45 which is equivalent to RM6,514,076.97 (exchange rate at USD1:RM3.0466) up to 31 October 2012 and IDR15,747,882,666.67 equivalent to RM4,724,364.80 (exchange rate at IDR100:RM0.03) up to 31 October 2012 together with late payment charges at the rate of 2%pa on the abovementioned sum from 1 November 2012 until full payment, costs and any other relief this court deemed fit. This sum was due and payable by PT Mindo Tech ('the borrower') to the plaintiff under the Syariah Banking Facility Agreement No 92 dated 29 March 2012 which the plaintiff granted to the borrower to the extent of USD4m and IDR40 billion.

[2] By a notice of application dated 20 May 2013 ('encl 17') the applicant/plaintiff ('the plaintiff') sought for a summary judgment to be entered against the respondents/defendants ('the defendants') pursuant to O 14 of the Rules of Court 2012 ('ROC').

[3] Upon perusal of the affidavits and the relevant submissions filed herein and upon hearing learned counsel for the plaintiff and the defendants, on

26 August 2013 this court allowed all the prayers in encl 17 except for the prayer for late payment charges to be entered against the defendants with costs fixed at RM4,000. Based on the documents filed herein the plaintiff had failed to prove to this court that it was entitled to late payment charges at the rate of 2%pa on the amount claimed. Therefore I rejected the plaintiff's prayer for late payment charges.

[4] Aggrieved by the said decision, the defendants appealed to the Court of Appeal Malaysia against part of the decision.

[5] For ease of reference the applicant/plaintiff will be referred to as 'the plaintiff' and the first, second and third defendants/first, second and third respondents will be referred to as 'the defendants' and/or 'the 1st, 2nd and 3rd defendants' respectively where ever appropriate.

THE APPLICATION

[6] Vide encl 17 the plaintiff sought, amongst others, for summary judgment to be entered against the defendants for the sum of USD2,138,146.45 which is equivalent to RM6,514,076.97 (exchange rate at USD1: RM3.0466) up to 31 October 2012 and IDR15,747,882,666.67 equivalent to RM4,724,364.80 (exchange rate at IDR100: RM0.03) up to 31 October 2012 together with late payment charges at the rate of 2%pa on the abovementioned sum from 1 November 2012 until full payment, costs on solicitors-client basis, costs of this action and any other relief deemed fit by this court.

[7] Other than the writ of summons and statement of claim dated 18 December 2012, the first defendant's defence dated 24 April 2013, the second and third defendants' defence dated 6 February 2012, the following affidavits were considered by this court:

(a) the plaintiff's affidavit in support of encl 17 affirmed by Junedi Gunting on 17 May 2013 ('encl 18');

(b) the defendants' affidavit in reply affirmed by Wong Yuen Hyaw affirmed on 4 June 2013 ('encl 20'); and

(c) the plaintiff's affidavit in reply affirmed by Junedi Ginting affirmed on 17 June 2013 ('encl 21').

[8] The grounds for the said encl 17 were as stated in the affidavit in support of encl 17 affirmed by Junedi Gunting on 17 May 2013 ('encl 18') filed herein. In essence the plaintiff averred that there are no merits in the defendants' defence. Neither could the defendants raise triable issues to merit a full blown trial.

BACKGROUND FACTS

[9] The brief facts leading to the claim can be stated as follows:

(a) at the request of the first defendant and through letters of offer dated 4 March 2011 and 5 January 2012 and a Syariah Banking Facility Agreement No 92 dated 29 March 2012 respectively, the plaintiff granted the borrower financing facilities to the extent of USD4m and IDR40 billion ('financing facility');

(b) the first, second and third defendants were the guarantors to the facility granted by the plaintiff to the borrower, PT Mindo Tech vide the execution of the following documents:

(i) corporate guarantee dated 29 March 2011 executed by the first defendant (exh 'A1' of encl 18 (see pp 7–17)); and

(ii) letter of guarantee dated 29 March 2011 executed by the second and third defendants respectively (exh 'A2' of encl 18 (see pp 19–31)),

(c) pursuant to the corporate guarantee, the first defendant guaranteed the payment on demand, of all sums of monies due and owing by the borrower to the plaintiff under the said financing facility, to the extent of USD4m and IDR40 billion together with late payment charges at the rate of 2%;

(d) pursuant to the letter of guarantee both the second and third defendants jointly and severally guaranteed the payment on demand of all sums due and payable by the borrower to the plaintiff pursuant to the financing facility to the extent of 4 milion and IDR40 billion together with late payment charges at the rate of 2%;

(e) cl 11 of the terms and conditions of the corporate guarantee and the letter of guarantee executed by the first, second and third defendants respectively provided that a statement signed by a manager, secretary or any officer of the plaintiff as to the monies and liabilities due and incurred to the plaintiff from the borrower shall be binding, final and conclusive evidence against the defendants for all purposes (see pp 12 and 24 of exh 'A2' of encl 18);

(f) the amount due and payable by the borrower to the plaintiff as at 31 October 2012 under the financing facility was in the sum of USD2,138,146.45 equivalent to RM6,514,076.97 (exchange rate at USD1: RM3.0466) up to 31 October 2012 and IDR15,747,882,666.67 equivalent to RM4,724,364.80 (exchange rate at IDR100: RM0.03) up to 31 October 2012 together with late payment charges at the rate of 2%pa on the abovementioned sum from 1 November 2012 until full payment;

(g) as the borrower had failed to pay the sum due and payable under the facility, the plaintiff then demanded from the first, second and third defendants as guarantors to the said financing facility, the payment of the outstanding amount vide notices of demand all dated 7 November 2012. (exh 'A3 and A4' of encl 18 (see pp 33–34 and 39–40)); and

(h) despite the notices of demand having been issued the defendants had failed, refused and/or neglected to pay the abovementioned sum to the plaintiff. Therefore the plaintiff claimed from the defendants the said amount together with late payment charges.

ISSUES RAISED BY THE DEFENDANTS

[10] In their attempt to resist the plaintiff's application for the prayers sought pursuant to the application, the defendants raised the following issues:

(a) there was undue delay in filing encl 17;

(b) the plaintiff had failed to exhibit the financing facility documents;

(c) the plaintiff failed to resort to legal action against the borrower or other security parties;

(d) the plaintiff had failed to exhibit the statement of account;

(e) the imposition of interest was in contravention with the Islamic principle of financing; and

(f) there was non-compliance with certain statutory provision.

[11] Based on the foregoing, the defendants contended that this was not a fit and proper case to be summarily disposed by way of an O 14 application. Hence the defendants urged this court to dismiss encl 17 with costs and prayed for this matter to be set down for trial.

ISSUES RAISED BY THE PLAINTIFF

[12] Learned counsel for the plaintiff raised, amongst others, the following arguments:

(a) encl 17 was filed on 20 May 2013 after the disposal of the defendants' application to set aside judgment in default entered against the first defendant dated 18 February 2013. The said application to set aside the judgment in default was disposed of only on 22 April 2013. The plaintiff was waiting for the outcome of the first defendant's application. All these facts were within the knowledge of the defendants' solicitors. Hence there was no inordinate delay on the part of the plaintiff in filing encl 17;

(b) as regards the non-filing of the financing facility documentation, the plaintiff contended that this was not fatal as the claims against the first, second and third defendants were made pursuant to the corporate guarantee and the letter of guarantee executed by the respective parties dated 29 March 2011 (exh 'A3' and 'A4' of encl 18 at pp 33–43). The rights and liabilities of the first, second and third defendants could be determined from the abovementioned documents;

(c) the claim of the defendants that the plaintiff had not exhausted its legal remedies and rights against the borrower and other security parties before pursuing its claim against the first, second and third defendants, the plaintiff submitted that under cl 7A of the corporate guarantee and cl 7A of the letter of guarantee there was no obligation on the part of the plaintiff to first exhaust all other remedies against the borrower or against other security parties before commencing the action against the defendants. The plaintiff was entitled to resort to any of the remedies available to it under the financing facility;

(d) with regard to the contention that the plaintiff had not exhibited its statement of account, the plaintiff responded by citing cl 11 of the corporate guarantee and cl 11 of the letter of guarantee executed by the defendants, which stipulated that a statement as to the amount due and owing issued under these clauses is final, binding and conclusive evidence as against the first, second and third defendants (see pp 33–34 of exh 'A3' and pp 39–40 of exh 'A4' of encl 18);

(e) the issue pertaining to the imposition of interest, the plaintiff submitted that late payment charges are not interest and these late payment charges are recognised under the Islamic principle of financing; and

(f) according to the plaintiff, the final issue raised by the defendants with regard to non-compliance with ss 4 and s 5 of the Bankers' Book (Evidence) Act 1949 and ss 34 and 91 of the Evidence Act 1950 are irrelevant and misconceived.

[13] In view of the above the plaintiff claimed that this was a good case to be disposed off under O 14 of the ROC.

THE LAW

[14] In *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283, the Federal Court had clearly laid down the preliminary requirements in an application for summary judgment under the O 14 of the then Rules of the High Court 1980 (now the ROC) as follows:

(a) the defendant had entered appearance;

(b) the statement of claim must have been served on the defendant; and

(c) the affidavit in support of the application must comply with the requirements of r 2 of O 14. The application must be supported by an affidavit stating the deponent's belief that there is no defence to the plaintiff's claim.

[15] Once the plaintiff had satisfied the three requirements as set out in the above quoted case, the plaintiff has established a prima facie case and is entitled to the judgment. The burden then shifted to the defendant to show the merits in the defence.

[16] It is trite that where all the issues are clear and the matter in substance can be decided once and for all without having to go through a full blown trial, the matter ought to be resolved and decided in an O 14 application. The court should only exercise the power under the said order in very clear cases (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; [1987] CLJ (Rep) 182; [1987] 1 CLJ 246; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 MLJ 332 ; [1987] CLJ (Rep) 120; [1987] 2 CLJ 9).

[17] In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282; [1980] 1 LNS 168 His Lordship Raja Azlan Shah CJ, (as His Highness was then) had stated as follows:

> That brings us to the important question whether the assistant registrar was entitled to deal with the case under the RSC O 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter this court, shall not deal with the whole matter under the RSC O 14 procedure.

[18] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 the Supreme Court observed that:

> ... the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

[19] In the same case, the Supreme Court went on to state as follows:

> ... apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[20] In *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 the Court of Appeal held as follows:

> The underlying philosophy in the O 14 provision is to prevent the plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied in cases where there is no reasonable doubt that the plaintiff is entitled to judgment. O 14 is not intended to shut out a defendant. The jurisdiction should be exercised in very clear cases.

(see *National Company of Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 ; [1984] 1 CLJ (Rep) 283).

FINDINGS OF THIS COURT

[21] It is important to bear in mind that when deciding an application under O 14 of the ROC, the court must look at the whole situation and be satisfied that the defendant has no fair or reasonable probability in having a real or bona fide defence. The court has a duty to peruse and examine all affidavits and documentary exhibits critically before making a decision. In *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 ; [1994] 1 CLJ 328 the Supreme Court held:

> It need hardly be emphasised that in order for the court to arrive at a decision that a defence has merits, it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.

[22] With the above principles in mind I will now examine the documents before me in order to ascertain if the plaintiff was entitled to summary judgment as prayed in encl 17 or whether the defendants had satisfied this court on affidavit evidence that the defence had not only raised an issue but also the said issue is triable. The determination of whether an issue is or is not triable would depend on the facts or the law as disclosed in the affidavit evidence before the court.

[23] Upon a perusal of the affidavits filed herein, I found that the defendants had failed to raise any triable issue which merited a full-blown trial. The following are my reasons.

Issue 1: Inordinate delay in filing of encl 17

[24] There was no inordinate delay in the filing of encl 17 by the plaintiff. In any event the plaintiff had satisfactorily explained to the court the reason for

the delay, if any. The court is given the discretion to examine the chronology of events surrounding each case in order to ascertain if the plaintiff was guilty of laches. Having considered the chronology of events and perusing the affidavit filed herein I am of the view that there was no inordinate delay in the filing of encl 17. Therefore this was a non-issue (see *Comptroller-General of Inland Revenue Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98; *MBF Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180).

Issue 2: Failure to exhibit the financing facility documentation

[25] The rights and obligations of the defendants were clearly defined in the corporate guarantee and the letter of guarantee respectively. The failure of the plaintiff to exhibit the financing facility documentation is not fatal. In this case, the parties have voluntarily agreed to be bound by the terms and conditions of the abovementioned documents. The rights and obligations of the defendants could be determined from the four corners of these documents. Therefore there was no necessity for the plaintiff to exhibit the financing facility documents. Further the defendants having executed the corporate guarantee and letter of guarantee respectively are bound by the terms of these guarantees to pay on demand the sums due and owing by the borrower under the financing facility. The defendants are bound by the terms of the guarantees unless if the defendants could show that the guarantees were tainted with fraud, misrepresentation or undue influence. This was not the defendants' pleaded case nor was any of the abovementioned elements proved.

[26] His Lordship Visu Sinnadurai J in *Polygram Records Sdn Bhd v Hillary Ang & Ors & Anor* [1994] 3 MLJ 127; [1994] 3 CLJ 806 observed at p 147 as follows:

> The general principle of law, of course, is that a party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence, or misrepresentation may be established. *This rule is so strict that even if a party to a contract has not read the contents of a contract, he is held to be bound by its terms*. In the leading case of *L'Estrange v F Graucob* [1934] 2 KB 394, Scrutton LJ pronounced (at p 403):
>
> > When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.
> > (Emphasis added.)

Issue 3: Whether the plaintiff must first exhaust its rights against the borrower or other security parties

[27] Upon perusal of cl 7A of the corporate guarantee and cl 7A of the letter of guarantee it is clear to me that the plaintiff was not obligated to first exhaust

its rights against the borrower or against other security parties before commencing its action against the defendants. Both cl 7A of the corporate guarantee and the letter of guarantee which are similar are reproduced below as follows:

> You shall have the right to exercise all or any of the remedies available whether by this guarantee or by statute or otherwise and shall be entitled to exercise such remedies concurrently including pursuing all remedies pursuant to this guarantee and civil suit against the Customer or other security party to recover all moneys due and owing to you PROVIDED THAT nothing herein contained shall be construed as imposing any obligations (whether at law or equity) upon you to exhaust your remedy to enforce any of the securities or against any other security party before commencing any action against us AND we hereby irrevocably and unconditionally agree and consent to you commencing separate proceedings, enforcing other remedies and exercising any other rights which you may have against us, the Customer or any security party simultaneously or consecutively in any order you deem fit.

[28] These clauses provided that the plaintiff had the right to pursue all remedies available against the defendants simultaneously, contemporaneously or consecutively to recover the monies the plaintiff had granted to the borrower pursuant to financing facility which were guaranteed by the defendants under the corporate guarantee and letter of guarantee respectively (see the case of *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478; [2009] 6 CLJ 81; *Bank Bumiputra Malaysia Bhd v Esah binti Abdul Gani* [1986] 1 MLJ 16).

Issue 4: Failure to exhibit statement of account

[29] The plaintiff had exhibited the 'certificate of indebtedness' issued by the plaintiff pursuant to cl 11 of the corporate guarantee and the letter of guarantee. These provisions which are similar in terms of substance and/or language are as follows:

> By admission or acknowledgement in writing by the Customer or any person authorized by the Customer, of the amount of indebtedness of the Customer to you and any judgment recovered by you against the Customer in respect of such indebtedness shall be binding and conclusive against you. A statement signed by your manager, secretary or any of your officers as to the moneys or liabilities for the time being due or incurred to you from or by the Customer shall be final and conclusive evidence against us for all purposes.

[30] Pursuant to cl 11 of the corporate guarantee and cl 11 of the letter of guarantee, a 'certificate of indebtedness' issued by the plaintiff is conclusive evidence of the borrower's indebtedness to the plaintiff. The plaintiff need not do anything beyond this. Once the plaintiff had exhibited the 'certificate of

indebtedness' as envisaged under cl 11 of the guarantees the burden then shifted to the defendants to disprove the amount claimed as stated in the 'certificate of indebtedness'. The law does not require the plaintiff to provide a detail statement of account as suggested by the defendants. Once the plaintiff had exhibited the 'certificate of indebtedness' the burden then shifted to the defendants to show by way of evidence that the calculation arrived by the plaintiff was wrong and/or that there was manifest error in the 'certificate of indebtedness'. My perusal of the affidavit evidence placed before me I found that the defendant had not discharged the burden to prove that the certificate of indebtedness was tainted with manifest errors. Therefore there was conclusive evidence before me that the amount due and owing were as shown in the said certificate. By executing the corporate guarantee and the letter of guarantee the defendants are bound by cl 11 of the respective guarantees and ought not to be allowed to challenge the same unless if the defendants could show manifest error. This principle had been entrenched in the often quoted case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 ; [2006] 3 CLJ 544 where the Federal Court held:

> A certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed. In the instant case, the relevant cl 27 and 7.03 of the loan agreement and guarantee agreement respectively were sufficiently clear. A clause of this nature has been described as a conclusive evidence clause and has been held to be binding and valid by courts in Australia and England. The certificate of indebtedness, issued in accordance with the aforesaid cl 27 and 7.03, was lucid enough. There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown, (paras 6 & 7).

Issue 5: Statutory non-compliance

[31] The final issue raised by the defendants with regard to non-compliance with ss 4 and 5 of the Bankers' Book (Evidence) Act 1949 and ss 34 and 91 of the Evidence Act 1950 are irrelevant and misconceived. Hence I would not deal with this issue.

CONCLUSION

[32] I am satisfied that the plaintiff had demonstrated to this court that its application was correctly and properly filed and the defendants had not discharged the burden to establish triable issues requiring a trial of the plaintiff's claim, in that, the issues that pass the test of bona fide triable issues to be supported by documents contemporaneous to the transaction which are precise and/or consistent with the undisputed contemporary document (see *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor*; *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400).

[33] I am satisfied that the issues raised by the defendants in the affidavit filed herein did not pass the test of 'triable issues' as envisaged by the case law quoted above. The defendants' affidavit contained bare averments and denials and did not constitute evidence and do not give rise to triable issues. On the contrary I found that the plaintiff had exhibited sufficient documents as required of it to show that the defendants' denials have no basis.

[34] Having considered the pleadings, the affidavits filed herein and the submissions by the respective counsels from both sides and having given the matter a very careful and serious consideration, I am of the view, based on the facts in this case, it is a straightforward and proper case to be disposed of by way of summary judgment under O 14 of the ROC. Accordingly I allowed the prayers sought vide encl 17 with cost of RM4,000 to be paid by the defendants to the plaintiff. However I had denied the plaintiff's claim for late payment charges as the plaintiff had failed to prove this portion of its claim by way of documentary evidence.

Application allowed with costs of RM4,000.

Reported by Kanesh Sundrum